ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

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Department of Justice
Washington, D.C. 20530

OLC # 1487

April 7, 1978

Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Citizens &
Shareholders Rights & Remedies
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to your request I am forwarding a draft amendment to S. 2117, a bill "To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees."

The draft amendment would establish a mechanism by which the victim of a so-called constitutional tort could initiate and participate in an agency discipline proceeding directed against the employee tortfeasor. We believe that our draft discipline proceeding will prove a more than adequate replacement for the victim-initiated sanctions against employees presumably lost by insulating employees from individual civil liability. The Office of Management and Budget has advised us that it has no objection to the amendment from the standpoint of the President's program.

I am also forwarding, pursuant to your request, a memorandum prepared by the Department's Office of Legal Counsel concerning the constitutionality of section 11 of S. 2117. As you know section 11 would make the bill applicable to all claims and suits pending on the date of enactment.

The memorandum concludes that the only constitutional question presented by the section is whether Congress can extinguish a plaintiff's right to a jury trial in a pending case. There is no constitutional question, the memorandum determines, posed by either the substitution of the United States as defendant or the abolition of claims for punitive damages in pending cases.

You will note that the memorandum presents three solutions to the Seventh Amendment problem caused by abrogating the plaintiff's right to a jury trial in a pending case. If the Subcommittee agrees with the Office of Legal Counsel that

there are problems with the retroactivity provision, the option acceptable to this Department would be that which would allow the continuance of trial by jury pending cases against the Government. We would be pleased to work with the Sub-committee staff in drafting such an amendment to the bill.

I trust that having been supplied with the Administration's disciplinary amendment, and our views on the constitutionality of the bill's retroactivity provision, your Subcommittee can now begin mark-up of S. 2117. We, of course, stand ready to assist you in any way that we can.

Sincerely,

(Signed) Patricia M. Wald

Patricia M. Wald
Assistant Attorney General

DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

Department of Justice
Washington, D.C. 20530

MEMORANDUM FOR PATRICIA M. WALD
Assistant Attorney General
Office of Legislative Affairs

Re: Constitutionality of Retroactivity of S. 2117

This memorandum responds to your request for our views on the constitutionality of retroactive application of proposed amendments to the Tort Claims Act. The bill in question, S. 2117, 95th Cong., 1st Sess. (1977), would provide, inter alia, an action against the Government as the exclusive remedy for certain claims alleging torticus conduct by U.S. employees. It would apply to common law tort claims as well as tort claims arising under the Constitution so long as the alleged tortious conduct was committed by Government employees acting within the scope of their employment or under color of law. Section 11 of the bill -- the section specifically at issue here -- would apply these provisions to all claims pending at the time S. 2117 is enacted. 1/ The bill would extinguish

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1/ Concerning the issue whether there is any vested interest in a cause of action growing out of a common law tort or a constitutional tort prior to judgment, there is some hornbook dictum to the effect that there is no vested interest in such claims. However, we have found that the scattered judicial decisions do not support that view of the law. Instead, it appears that plaintiffs do have protectable interests in causes of action prior to judgment. See Massa v. Nastri, 125 Conn. 144, 3 A.2d 839 (1939). The only cases that have tolerated the abrogation of pending causes of action are those arising under the "Portal-to-Portal Act," and those cases carefully limit their holding to the abrogation of rights created by statute. See Battaglia v. General Motors Corp., 169 F.2d 254 (2nd Cir. 1948); Seese v. Bethlehem, 168 F.2d 58 (4th Cir. 1948).

claims against individual Government employees and replace them with claims against the United States. Recovery under these claims, however, would be limited to the amount of compensatory damages proved, i.e., punitive damages would not be allowed. Additionally, as in all other cases under the Tort Claims Act, 28 U.S.C. §§ 1346 and 2402, jury trials would not be available. For the reasons that follow we are of the opinion that the denial of punitive damages to persons with pending claims would not be inconsistent with the Constitution. However, we believe that S. 2117's proposed retroactive extinguishment of the right to a jury trial does present constitutional problems which should be carefully considered.

The questions whether Congress can deny jury trials and punitive damage recoveries to those claimants with pending claims raise the issue, which has been frequently litigated, whether and to what extent Congress is empowered to enact "retroactive" legislation. 2/ The provision of the Constitution which limits the Federal Government's power to enact retroactive legislation is the Due Process Clause of the Fifth Amendment. However, that clause "generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive.'"

2/ Although in Smallwood v. Gallardo, 275 U.S. 56, 61 (1927), Mr. Justice Holmes reasoned that to "apply [a] statute to present suits is not to give it retrospective effect," we will assume retroactive effect for purposes of this memorandum.

United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 17 n.3 (1977), 3/ citing Welch v. Henry, 305 U.S. 134, 147 (1938) and Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14-20 (1976).

In Usery the Court stated:

> [O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. [citations omitted] This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. [citations omitted] Id. at 16.

3/ In United States Trust Co., the Court considered retroactive State legislation; thus the Due Process Clause of the Fourteenth Amendment was the relevant constitutional provision. The Fifth Amendment's Due Process Clause applies to Federal legislation. The Contract Clause, Article I, Section 10 of the Constitution was also an issue in United States Trust Co., but since that Clause by its terms only prohibits States from passing laws which impair contractual obligations it is no bar to Federal action. However, some commentators have opined that there is a "tendency for the contract clause and the due process clause to coalesce," Hale, The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 852, 890-91 n. 18 (1944); Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960).

Usery involved the constitutionality of the retroactive aspects of Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 150, 30 U.S.C. § 901 et seq. (1970 ed. and Supp. IV). In upholding the Act, the Court concluded:

> In sum, the Due Process Clause poses no bar to requiring an operator [of a coal mine] to provide compensation for a former employee's death or disability due to pneumoconiosis [black lung disease] arising out of employment in its mines, even if the former employee terminated his employment in the industry before the Act was passed. 428 U.S. at 19-20.

In so holding, the Court discussed at some length the sorts of considerations which properly should be brought to bear on retroactivity questions. After noting that a more demanding standard would probably be appropriate for judging the retrospective aspects of legislation than for judging fully prospective laws, the Court acknowledged the importance of deferring to Congress' judgment where questions such as the allocation of costs and burdens are concerned. Id. at 16-19. The Court's analysis suggests that it applied in that case a test much like the rational basis test commonly invoked in evaluating Equal Protection cases.

Although other decisions have ruled on the scope of Congress' power to legislate in a manner that may have retroactive consequences, none have sqarely identified the test or standard against which such legislation is to be judged. See, e.g., Fleming v. Rhodes, 331 U.S. 100, 102 (1947). For example, the Court in United States Trust Co., suggested that retroactive civil legislation would satisfy the requirement of due process so long as it was not "harsh and oppressive." 431 U.S. at 17 n.13. Our review of the

decisions dealing with retroactive legislation indicates that an analysis much like that articulated several years ago by Professor Hochman in a major article on this question may explain the results in those cases. He suggested the following general approach:

> [I]t is submitted that the constitutionality of such a statute is determined by three major factors, each of which must be weighed in any particular case. These factors are: the nature and strength of the public interest served by the statute; the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right that the statute alters.

Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 697 (1960).

Professor Hochman's analysis is quite similar to the approach the Supreme Court has articulated in a related context. The Court has long grappled with the more general question whether new legislation, administrative regulations, and judicial decisions should be applied to pending cases. See, e.g., United States v. Schooner Peggy, 1 Cranch (U.S.) 103, 2 L.Ed. 49 (1801); Thorpe v. Housing Authority, 393 U.S. 268 (1969). As a result of Court decisions in these cases, a general rule has now been fashioned to deal with those situations in which Congress has not stated with specificity whether a new law is to be applied to pending cases. That rule, stated in summary form, is that new legislation will be applied by the courts to pending cases unless to do so would occasion some "manifest injustice." Bradley v. United States, 416 U.S. 696, 717 (1974). In determining whether a law will have that effect if applied to pending cases, the Court has

identified three considerations: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Id. These, then, are the factors that a court would consider in deciding whether to apply new legislation to pending cases when Congress has not spoken to that issue. They are considerations rooted in the due process clause, and are quite similar to the ones that Congress must address in making judgments on the application of new laws to existing cases.

With these several formulations in mind, we may address the questions presented by the Federal Torts Claims Act amendments. The several tests may be reduced to a straightforward inquiry: if Congress, in the exercise of its broad discretionary authority, determines that it is in the public interest to extinguish pending punitive damage claims or to bar jury trials in pending cases, would that action so adversely affect the significant rights of individual claimants as to deprive them of due process?

1. Punitive Damages

The punitive damage question is the easier of the two. The appropriateness of allowing punitive damage awards is peculiarly a question of public policy, and appears always to have been so understood. Smith v. Hill, 12 Ill. 2d 588, 147 N.E. 2d 321 (1958); see also Washington Gas Light Co. v. Lansden, 172 U.S. 534 (1899); cf. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). They are allowed to particular plaintiffs not to compensate them for injuries or damage they have suffered but to make an example of the defendant in order to deter him and others from engaging in similar conduct in the future. Washington Gas Light Co. v. Lansden, 172 U.S. 534 (1899); Rosenbloom v. Metromedia, 403 U.S. 29, 84 (1971) (dissenting opinion of Justices Marshall and Stewart). The individual plaintiff, even after his cause of action has

accrued and his action has been filed has no "vested right" to a punitive damage recovery, 4/ and indeed even in cases in which all of the elements justifying such an award have been proved it remains within the discretion of the trier of fact to determine whether an award will be made. Whiteis v. Yamaha Intern. Corp., 531 F.2d 968, 973 (10th Cir. 1976); Williams v. Farmers and Merchants Insur. Co., 457 F.2d 37, 40 (8th Cir. 1972); Smith v. Hill, supra.

It is within Congress' authority to conclude that punitive damage awards are not necessary to deter tortious conduct by government employees. Congress could also find it in the public interest to relieve public employees of the concern for defending against such claims. Since barring punitive damage recoveries does not deprive individual plaintiffs of rights to which they have any substantial entitlement, we do not think that courts would find this amendment to be "harsh and oppressive" or to occasion any "manifest injustice." 5/

4/ Smith v. Hill, supra, held that a vested right in punitive damages arises only when such damages have been allowed by a judgment in the plaintiff's favor. 12 Ill. 2d 595, 147 N.E. 2d 325.

5/ The Illinois Supreme Court, in Smith v. Hill, supra, considered a claim that an Illinois statute disallowing punitive damage claims in breach of promise to marry cases was unconstitutional. Quickly disposing of this claim the Illinois court held:

> The act in barring punitive damages merely establishes a "public policy" that in the interest of society in the particular class of cases such damages should not be awarded. Such damages being allowed in the interest of society, and not to recompense solely the individual, to deny them cannot be said to deny any constitutional right . . . .
> 12 Ill. 2d at 598, 147 N.E. 2d at 327.

(Footnote 5/ continued on page 8)

2. Retroactive Abrogation of Jury Trials

The bill would also extinguish the right to jury trials for claims based upon certain categories of tortious conduct by Government employees. This would be accomplished by abolishing the present common law cause of action against the employee and creating in its stead a cause of action against the United States. That Congress can do this -- at least prospectively -- is now beyond legal dispute. The Supreme Court in Silver v. Silver, 280 U.S. 117, 122 (1929), in sustaining the abolition of a gratuitous passenger's right to sue his host for negligence, held:

> the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law . . . .

It has been held that a statute replacing a common law cause of action against a Government employee with a statutory remedy against the Government for injuries caused by tortious acts of the employee in the course of his employment, does not violate the Seventh Amendment. In Nistendirk v. McGee, 225 F. Supp. 881 (W.D. Miss. 1963), the court considered the constitutionality of 28 U.S.C. § 2679(b) which provides that claims for injuries caused by Government employees driving motor vehicles in the scope of their employment shall be tried as if they were brought under the Federal Tort Claims Act. Thus, as under S. 2117, there would be no right to a jury trial. See 28 U.S.C. § 2402. The court, in upholding 28 U.S.C. § 2679(b)'s denial of a jury trial, reasoned:

5/ continued from page 7

The court thus ruled that the legislature could, at its discretion, restrict or deny punitive damages. Since punitive damages are intended to benefit society and not the injured party, the court found that the plaintiff had no significant personal interest in their allowance or disallowance.

> Plaintiff's common law action against defendant McGee has been abolished, and a statutory action under § 1346, Title 28, United States Code, has been substituted in its place. There no longer exists any cause of action against McGee, and since the cause of action given against the government is a statutory one, the guarantees of the Seventh Amendment do not apply.

See also Wolfe v. Merrill National Laboratories, 433 F. Supp. 231 (M.D. Tenn. 1977); Sparks v. Wyeth Laboratories, Inc., 431 F. Supp. 411 (W.D. Okla. 1977); Gustafson v. Peck, 216 F. Supp. 370 (N.D. Iowa 1963).

That Congress is empowered to deny jury trials prospectively to newly created actions against the Government is clear. The question at hand, however, is whether Congress can constitutionally deny jury trials in pending claims by abolishing those claims and substituting new causes of action. 6/ This proposed action, when measured

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6/ In discussing this issue we use the term "pending claims" to mean the point at which the right to jury trial attaches. We believe that this occurs when a plaintiff has filed his complaint in federal court and has either already demanded, or has not yet waived (pursuant to Rule 38, F.R. Civ. P.), his Seventh Amendment right to a jury trial at the time this bill becomes law. Although we have found no decisions precisely on point we think it reasonable to conclude on the basis of the language of the Amendment itself that the right does not attach until there is a "suit" and until there is a "value in controversy" which exceeds the minimal $20 requirement. Thus, the pendency of an administrative claim would not satisfy this requirement; nor would the mere existence of an alleged injury.

against the various standards of constitutionality for retroactive legislation, raises serious doubts. There is a crucial difference between the interest at stake where punitive damage awards are extinguished and the nature of the plaintiff's interest in a jury trial. Jury trials are guaranteed, in certain cases, by the Seventh Amendment. Once that right attaches its abrogation cannot lightly be undertaken.

While Congress enjoys considerable latitude in fashioning tools to deal with the matters within its constitutionally cognizable areas of power, that power is not unlimited. Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937), for example, allows abrogation of rules of procedure in pending cases but conditions such action upon the substitution of a general procedure which is "fair and adequate." Id. at 352. The court there focused on questions of burdens of proof and the use of presumptions -- aspects of civil proceedings which are protected by the Constitution only under the general umbrella of the Due Process Clause. It did not deal with the abrogation of a right specifically provided by one of the Bill of Rights Amendments, and we know of no other case in which the court has been willing to find a "fair and adequate" alternative to some constitutionally protected right.

Although procedural matters may impact heavily upon a particular case, e.g., burdens of proof, presumptions, etc., courts have maintained a clear distinction between these and fundamental rights. The right to jury trial is plainly considered to be a fundamental right and as such is to be distinguished from procedural rights. In this regard the court in Colgrove v. Battin, 413 U.S. 149 (1975) stated;

> Consistently with the historical objective of the Seventh Amendment, our decisions have defined the jury trial right preserved

> in cases covered by the Amendment as "the substance of the common law right of trial by jury, as distinguished from mere matters of form or procedure . . . ." [citations omitted] Id. at 156. 7/

This distinction is further illustrated in Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945). There the Supreme Court upheld a statute which extended the statute of limitations in a pending suit thereby frustrating the defendant's effort to dismiss the action. After noting that "[n]o one has a vested right in any given mode of procedure," the Court disposed of the case on the ground primarily that the protections afforded by the statutes of limitation have "never been regarded as what now is called a fundamental right." Id. at 314. The right to trial by jury, being guaranteed by the Constitution, is undoubtedly a fundamental right. 8/

7/ See also Baltimore & Carolina Line Inc. v. Redman, 295 U.S. 654, 657 (1934).

8/ The cases indicate that courts shield certain basic rights from retroactive infringement. As stated in Carr v. United States, 422 F.2d 1007 (4th Cir. 1970), questions of constitutional dimension may be raised by retroactive application of a law to pending claims. Carr was an action for personal injuries involving federal employees. The court held that the Federal Drivers Act, 28 U.S.C. § 2679(b-e) abrogated a federal employer's common law action against a Government driver acting within the scope of his employment. The court further upheld the constitutionality of this Act even though it did not provide the plaintiff with some new benefit as a quid pro quo. However, the court was careful to distinguish its holding from Richmond Screw Anchor Co. v. United States, 275 U.S. 331 (1928) by stating:

(Footnote 8/ continued on page 12)

In the absence of any directly controlling judicial precedent, we cannot conclude with very much confidence that this proposed amendment would, or would not, survive a due process challenge. The cases do make plain, however, that what is being dissoved here is an important substantive right. That being the case, the inquiry will focus on what public purposes are being served by its abrogation. The considerations that support the bar to punitive damages and that support the substitution of the Government as defendant in the stead of the individual government employee would seem to have little relevance to the jury trial issue.

It is worth noting that in other related contexts Congress has declined to apply the jury trial bar to pending claims. For instance, the Federal Driver's Act, 28 U.S.C. § 2679(b-e), which substituted the Government as defendant in claims growing out of motor vehicle incidents contained a specific provision applying it only prospectively. Pub. L. No. 87-258, § 2.

8/ continued from page 11

> There the Supreme Court dealt with statutes whose combined effect deprived a patent owner of his right to sue for infringement, but the patent in that case had been issued prior to the enactment of the relevant legislation. There was, therefore, a vested right in being which was sought to be abrogated. By contrast, here the accident occured over four years after the enactment of the Drivers Act. Therefore, under Silver, Carr had no interest entitled to constitutional protection. Id. at 1010-11.

Although the precise issue in Carr was whether the "just compensation" provision of the Fifth Amendment was violated, the court focused on whether Carr had an "interest entitled to constitutional protection" which came into being before the passage of the Drivers Act.

Likewise, the statute which substituted the Government as defendant in cases growing out of alleged torts by armed forces medical personnel, was limited by Congress to prospective application. Pub. L. No.94-464, 10 U.S.C.A. § 1089. The same approach was adopted with respect to claims against Veterans Administration medical personnel. Pub. L. No. 89-506, 38 U.S.C. § 4611. 9/

Given this cautious history, and given the analysis suggested by the cases, it would seem almost certain that the jury trial question would be a subject of litigation. Absent some strong legislative rationale supporting application of the amendment to pending cases, we would recommend against supporting language that would purport to bar jury trials in those cases in which the right has attached.

9/ But see Pub. L. No. 94-350, 22 U.S.C.A. § 817(a) (State Department medical personnel) and Pub. L. No. 91-623, 42 U.S.C. § 233 (Public Health Service medical personnel). Neither of these provisions are expressly limited in their application to prospective claims. However, we were orally advised by Mr. K.E. Malmborg, Assistant Legal Advisor for Management, Department of State, that he is not aware of any attempt to apply Pub. L. No. 94-350 to claims pending at the time of the enactment of that law. At this writing we have not received a response from HEW regarding a similar inquiry about Pub. L. No. 91-623. There is no language in either of the foregoing provisions mandating that they be applied to pending claims. Further, there is no discussion in the legislative history of either of these provisions to indicate that pending claims would be abolished.

The central point is that the bill as presently drafted contemplates taking away a jury trial right in particular cases in which a plaintiff has elected to pursue that right, and we know of no satisfactory way of supporting a congressional judgment that substitutes some other mechanism in the place of that right. It is for that reason that we have concluded that there must be some very strong basis for any action that would abrogate the right in pending cases if there is to be any chance of success against constitutional challenge.

With the matter in this posture, we see essentially three alternatives:

(1) Amend the bill to provide that plaintiffs in pending cases (who have either already elected a jury trial or who have not yet waived that opportunity) may elect either to proceed against the individual and to enjoy their jury trial prerogative or to proceed against the United States as a substituted defendant without a jury trial.10/

(2) Substitute the United States as defendant in all cases covered by the amendment, but allow the plaintiff to retain his jury trial right. This would, in essence, constitute a limited consent by the United States to a jury trial action against itself.

10/ It should be noted that, for the reasons set forth above, we think that in either event the bill could abolish the right to seek punitive damages. Stripped of the punitive damage benefit, it seems reasonable to assume that most plaintiffs would prefer to litigate against the more "financially responsible" party.

(3) Carve out pending cases in which jury trials have been requested and allow the plaintiffs to proceed as they are at present against the defendant individually, but provide that any judgment against him shall be indemnified by the Government. Presumably, although we have not researched the issue, the fact of indemnification could be withheld from the jury.

CONCLUSION

For the reasons stated we believe that S. 2117 does raise a substantial constitutional question, and one that we would resolve against the constitutionality of the bill as presently drafted. The selection of an alternative is essentially a policy matter and we lack the knowledge base to render very much in the way of useful advice on that issue.

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

Title 5, United States Code, is amended by adding a new chapter 78 containing new sections 7801, 7802, 7803, 7804, 7805, and 7806 as follows:

"Section 7801. Definitions

For the purposes of this chapter:

(1) "Person" means any natural person subject to the Constitution of the United States;

(2) "Federal agency" means a Federal agency, as defined in section 2671 of title 28, United States Code, which employs or employed an "employee" defined in subsection (3) of this section;

(3) "Employee", unless otherwise described, means a present "employee of the Government" as defined in section 2671 of title 28, United States Code; and

(4) "Disciplinary Action" means removal, suspension without pay, demotion, admonishment or reprimand for such cause as will promote the efficiency of the service.

Section 7802. Administrative inquiries

(a)(1) Where a claim filed by a person under section 2675 of title 28, United States Code, arising under the Constitution of the United States, results in an administrative award, compromise or settlement paid by the United States, and except as provided in section 7803, such person within 30 days of execution of the award, compromise or settlement, may submit a written request to the head of the

Federal agency or his designee to initiate an administrative inquiry of the acts of the employee which gave rise to the claim, as provided by rules, regulations, and instructions issued pursuant to subsection (b) of this section.

(a)(2) Where a civil action brought in any court by a person under section 1346(b) of title 28, United States Code, on a claim arising under the Constitution of the United States, results in a judgment against the United States, or a settlement or compromise executed by the United States, and except as provided in section 7803, such person within 30 days after time for appeal of the judgment has expired, or within 30 days after execution of the settlement or compromise, may submit a written request to the head of the Federal agency or his designee to initiate an administrative inquiry of the acts of the employee which gave rise to the claim, as provided by rules, regulations, and instructions issued pursuant to subsection (b) of this section.

(b) Within 60 days of the effective date of the regulations described in section 7805 of this chapter, the head of each Federal agency to which such regulations are applicable shall issue rules, regulations, and instructions for initiating and conducting an administrative inquiry requested under subsection (a)(1) or (a)(2).

(c) a person who has requested an inquiry under subsection (a)(1) or (a)(2) of this section;

(1) may submit a statement, and if a hearing is held, give testimony, pursuant to the rules, regulations, and instructions issued under subsection (b), and shall be

notified of the action taken on such request or inquiry and the reasons therefore, and

(2) may, within 30 days from notification of the action of the Federal agency, appeal its action (A) to the Secretary of Defense or his designee if the employee is a uniformed member of the Armed Forces as described in section 101(4) of title 10 of the United States Code, (B) to the Secretary of the Department in which the United States Coast Guard is operating or his designee if the employee is a member of the Coast Guard, (C) to the head of an agency or his designee with a personnel system under the Foreign Service Act of 1946, as amended (22 U.S.C. 801 et seq.), if the employee is an employee of the Foreign Service, (D) to the head of an agency or his designee with a personnel system under the Public Health Service Acts, as amended (42 U.S.C. 191 et seq.), if the employee is an employee or the Pulic Health Service, (E) to a reviewing entity or agency designated by the President to review the proceeding concerning an employee engaged in intelligence activities, or (F) to the Civil Service Commission in any other case. Such appeal process shall include de novo review of the acts of the employee which gave use to the request under subsection (a)(1) or (a)(2). Such review shall be conducted pursuant to regulations issued under section 7805 of this chapter, and shall include the issuance of a final decision with a statement of reasons and a recommendation of disciplinary action if any.

Section 7803. Former employees; present and former Presidential appointees.

With respect to a claim against a former employee or a present or former appointee of the President, a person who has met the requirements of § 7802(a) of this chapter shall be entitled to request an administrative inquiry based upon his claim described in subsection (a)(1) and (a)(2) of section 7802 of this chapter by (A) the Secretary of Defense if the former employee or present or former Presidential appointee is a uniformed member of the Armed Forces as described in section 101(4) of title 10 of the United States Code, (B) the Secretary of the Department in which the United States Coast Guard is operating if the former employee or present or former Presidential appointee is a member of the Coast Guard, (C) the head of an agency with a personnel system under the Foreign Service Act of 1946, as amended (22 U.S.C. 801 et seq.), if the former employee or present or former Presidential appointee is an employee of the foreign service, (D) to the head of an agency or his designee with a personnel system under the Public Health Service Acts, as amended (42 U.S.C. 191 et seq.), if the former employee or present or former Presidential appointee is an employee of the Public Health Service, (E) to a reviewing entity or agency designated by the President to review the proceeding concerning a former employee or present or former Presidential appointee engaged in intelligence activities, or (F) the

Civil Service Commission in any other case. Such inquiries shall result in a written report to be made public not less than 30 days after service of the report on the former employee or present or former Presidential appointee whose conduct has been the subject of the administrative inquiry.

Section 7804. Judicial Review

(a) A person who has obtained a final decision as provided by subsection (c)(2) of the section 7802 of this chapter may within 30 days thereof petition for its review in a district court of the United States which may affirm the decision or may set it aside and remand for further proceedings if the decision is found to be arbitrary or capricious based upon a review of the decision, statement of reasons, and recommended disciplinary action if any, issued pursuant to subsection (c)(2) of section 7802 of this chapter. Such review shall be held in camera for matters specifically protected from disclosure by statute or executive order or if the District Court determines that in camera review is in the interests of national security.

(b) A former employee or a present or former Presidential appointee whose conduct has been the subject of an administrative inquiry under section 7803 of this chapter may within 30 days after service upon him of the report of such inquiry, petition for its review in a district court of the United States which may enjoin the public release of such report if found by the court to be arbitrary or capricious.

Section 7805. Regulations

(a) Except as otherwise provided in this chapter, the Civil Service Commission with the approval of the Attorney General, within 90 days of enactment of this chapter, shall issue such regulations as it deems necessary and appropriate for the implementation of sections 7802-7804 of this chapter. The head of each Federal agency subject to the administrative review provisions of subsection 7802(c)(2)(F) of this chapter shall comply with such regulations and shall issue rules, regulations and instructions not inconsistent therewith.

(b) The Secretary of Defense, within 90 days of enactment of this chapter, shall issue such regulations as he deems necessary and appropriate for the implementation of sections 7802-7804 of this chapter. The head of each Federal agency which is enumerated in section 101(4) of title 10 of the United States Code shall, with respect to such uniformed members of the Armed Forces, comply with such regulations and shall issue rules, regulations, and instructions not inconsistent therewith.

(c) The reviewing entity or agency designated by the President for reviewing the conduct of employees or officers engaged in intelligence activities, within 90 days of the enactment of this chapter, shall issue such regulations as it deems necessary and appropriate for the implementation of sections 7802-7804 of this chapter. The head of each Federal agency having employees or officers engaged in intelligence

activities shall comply with such regulations and shall issue rules, regulations and instructions not inconsistent therewith.

(d) The Secretary of the Department in which the United States Coast Guard is operating, within 90 days of the enactment of this chapter, shall issue such regulations as are necessary and appropriate for the implementation of sections 7802-7804 of this chapter.

(e) The head of the agency with a personnel system under the Foreign Service Act of 1946, as amended, within 90 days of the enactment of this chapter, shall issue such regulations as are necessary and appropriate for the implementation of sections 7802-7804 of this chapter.

(f) The head of the agency with a personnel system under the Public Health Service Acts, so amended, within 90 days of the enactment of this chapter, shall issue such regulations as are necessary and appropriate for the implementation of sections 7802-7804 of this chapter.

Section 7806. Miscellaneous

(a) Nothing in this chapter shall affect the rights of an employee to appeal or to seek review or other means of redress of any disciplinary action taken against him which he would have under other provisions of law. However, an employee, who was the subject of a disciplinary action recommended by the Civil Service Commission pursuant to sub-

section 7802(c), shall not be required by any other provision of law to appeal an agency disciplinary action to the Commission prior to seeking any judicial review of that action.

(b) If an employee is not entitled under other provisions of law to seek administrative or judicial review of any disciplinary action taken against him, he may in the event a complainant seeks administrative review provided by section 7802(c)(2) of this chapter, participate in such review and give evidence or testimony if a hearing is held, and to the extent provided by section 7804 of this chapter petition for judicial review of a final decision if any disciplinary action recommended under subsection 7802(c)(2) of this chapter is greater than that determined by the employing Federal agency under subsection 7801(c)(1).

(c) Nothing in this chapter shall affect the availability of defenses which an employee may raise in any administrative or judicial proceeding.

(d) Nothing in this chapter shall require a Federal agency to delay its disciplining of an employee, or empower the Civil Service Commission to reduce the severity of disciplinary action imposed by an agency against an employee who would not have a right to seek the Civil Service Commission's review of such action under other provisions of law.

Pro Leg

OLC #78-1487

OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO Art Schissel (Treasury)

Dorothy Mayo (CSC)

STAT [redacted] (CIA)

Bob Rabben (DOD)

Take necessary action	☐
Approval or signature	☐
Comment	☐
Prepare reply	☐
Discuss with me	☐
For your information	☐
See remarks below	☐

FROM Bob Carlstrom DATE 4/17/78

REMARKS

For your information.

OMB FORM 4
REV AUG 70